IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5078

DEAN RENE PETERS,

Petitioner,

v.

C. P. KIFF,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

ARGUMENT

Because the petition for writ of habeas corpus was denied without a hearing, the facts are not in dispute here. Thus, this case presents squarely the issue of whether a white defendant may have his indictment quashed or his conviction reversed on the ground that blacks have been excluded from juries in violation of the Constitution and statutes of the United States. We urge that two independent reasons require an affirmative answer: (1) all defendants have the right under the due process clause to be indicted and tried by juries that reflect a cross-section of the com-

munity, *i.e.*, from which no significant group has been excluded; and (2) a defendant has standing to enforce the rights of the excluded group even if he is not a member of it under the reasoning of *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

I

The Due Process Clause Requires That Juries Reasonably Reflect a Cross-Section of the Community.

This case raises squarely the issue left open by this Court in *Fay* v. *New York*, 332 U.S. 261 (1947), whether the due process clause alone bars the exclusion of racial groups from juries so that the constitutional rights of defendants not members of the excluded group are violated. See, 332 U.S. at 284, n. 27. Amicus urges that the proper view is that there is an independent due process right to be indicted and tried by a jury selected from venires that fairly represent a cross-section of the entire community. This requirement arises from "the very idea of a jury"[1] as a democratic institution[2] whose purpose is to interpose between the state and the accused a group of laymen who speak for the community *as a whole*.[3]

Here, of course, because of the exclusion of blacks, the jury did not represent the community as a whole. Indeed, it was composed in direct and flagrant violation of the Constitution and laws of the United States (18 U.S.C. §243) in spite of decisions of this Court dating back nine decades. *Strauder* v. *West Virginia*, 100 U.S. 303 (1880); see, *Patton* v. *Mississippi*, 332 U.S. 463, 465, n. 3 (1947). The particu-

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[1] *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320, 330 (1970).

[2] *Ballard* v. *United States*, 329 U.S. 187, 195 (1946).

[3] *Williams* v. *Florida*, 399 U.S. 78, 100 (1970).

lar device used to exclude blacks in petitioner's case—segregated tax digests—was struck down by this Court the year after he was convicted in *Whitus* v. *Georgia*, 385 U.S. 545 (1967). *Whitus* essentially followed, as directly controlling, the decision in *Avery* v. *Georgia*, 345 U.S. 559 (1953), decided thirteen years earlier. And see, *Vanleeward* v. *Rutledge*, 369 F.2d 584 (5th Cir. 1966).

Essentially, the State of Georgia argues that despite the fact that the juries that indicted and convicted petitioner were composed in clear violation of federal law, its illegal acts are insulated from attack here by the fortuity that the defendant is white.[*] We urge that this Court rather adopt the enlightened view of the Supreme Court of Maryland and hold that: "every person accused of crime has the right to be tried under what has been determined to be the law of the land," *Maryland* v. *Madison*, 240 Md. 265, 213 A.2d 880, 882 (1965). See also, *Allen* v. *State*, 110 Ga. App. 56, 137 S.E.2d 711 (1964).

In *Madison*, the court held that a believer in God had the right to be indicted by a jury from which nonbelievers had not been unconstitutionally excluded; in *Allen*, the court held that a white had the right to be tried by a jury from which blacks had not been similarly excluded. Both decisions rested on holdings of this Court interpreting federal jury statutes and held that their reasoning applied to constitutional challenges. As this Court said in *Ballard* v. *United States*, 329 U.S. 187, 195 (1946):

> The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution,

[*] In a sense, a white defendant is also denied equal protection by not being allowed to challenge the exclusion of blacks. That is, his conviction stands solely because of his race, since if he were black it would not. See, *Maryland* v. *Madison*, 240 Md. 265, 213 A.2d 880, 886 (1965).

to the community at large, and to the democratic ideal reflected in the processes of our courts.

All three cases recognized that it was a denial of due process in the most fundamental sense to permit a defendant to be deprived of liberty by a jury that was convened in violation of the Constitution. Again, the decisions rest on the necessity of protecting the jury system as an institution whose purpose is to protect the rights of *all* persons charged by the state by putting the ultimate decision as to their fate in the hands of "a body truly representative of the community." A jury otherwise constituted "is at war with our basic concepts of a democratic society and a representative government." *Smith* v. *Texas,* 311 U.S. 128, 130 (1940). See also, *Hill* v. *Texas,* 316 U.S. 400, 406 (1942).

II

Petitioner Can Challenge the Exclusion of Blacks Under the Reasoning of *Barrows* v. *Jackson*.

In Part I we have argued that a white defendant—indeed that *all* defendants—have a personal right under the due process clause to be indicted and tried by juries selected in accordance with the Constitution. In addition, we urge that white defendants should be given standing to enforce the right of blacks not to be denied equal protection and thus to effectuate fully the constitutional guarantees that this Court has so long sought to enforce.

It has been pointed out above that ever since 1880 this Court, in an undeviating line of decisions, has held that exclusion of blacks from jury service violates the law. Sadly, there has been an equally undeviating history of resistance to and circumvention of the holdings of this Court. Despite the passage of ninety years since *Strauder,*

this Court is still called on to strike down unconstitutional jury discrimination. See, *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Alexander* v. *Louisiana*, O.T. 1971, No. 70-5026.

We suggest that one explanation for this unfortunate fact is that jury officials have believed that they could, by and large, get away with unlawful discrimination in most cases. Only blacks could complain; and most black defendants lacked the resources to, and/or lawyers who would,[5] raise and prove jury discrimination claims.

If, however, this Court makes it clear that *no* conviction of *any* defendant may stand when blacks have been unlawfully excluded from juries, then there may be a different result. At long last, state officials may decide that they have more to lose than to gain by continuing jury discrimination. The rights of all concerned—black defendants, white defendants, and black prospective jurors—may finally become realities.

Thus, this case is closely analogous to *Barrows* v. *Jackson*, 346 U.S. 249 (1953). There, the Court held that a white homeowner could raise the constitutional right of blacks not to be denied equal access to housing by state action as a defense to an action for damages for violating a racial restrictive covenant. The specific basis for allowing standing to a white to raise the constitutional rights of blacks was that it was necessary for the effective enforcement of those rights. Otherwise, the use of restrictive covenants would be encouraged (346 U.S. at 254), just as here the continuation of discriminatory jury selection would be encouraged. And the refusal to allow petitioner to challenge the composition of his jury would have the sole effect "of giving vitality to" unlawful racial discrimination. See, 346 U.S. at 258.

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[5] See, *United States ex rel. Goldsby* v. *Harpole*, 263 F.2d 71, 82 (5th Cir. 1959); *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964).

It is true that in *Barrows* the Court was led to its holding partly by the fact that since it was unlikely that black prospective property buyers would come before the courts, the *only* way to protect their rights would be to allow white property owners to defend in damage actions. On the other hand, the right of blacks to be free of discrimination in the jury selection process can and has been raised by blacks themselves. Nevertheless, *Barrows* should not be distinguished on that ground. As the experience of ninety years has shown, the problem of jury discrimination persists despite the fact that blacks can and do raise the issue. For the reasons set out above, we urge that only by allowing all defendant to challenge illegal jury selection methods will this blot on the administration of justice be eradicated once and for all. Thus, the same concepts of public policy that were determinative in *Barrows* should govern here.

III

A Decision That White Defendants May Challenge Discrimination Against Blacks in Jury Selection Should Be Made Fully Retroactive.

Petitioner, in his brief, explains why, under the standards set out by this Court in *Stovall* v. *Denno,* 388 U.S. 293 (1967), a decision that white defendants may challenge the illegal exclusion of blacks from juries should be made fully retroactive. We add two brief comments.

First, we urge that the most analogous case is *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968). There, this Court held that its new rule that persons with scruples against the death penalty could not be excluded from juries in capital cases was to be fully retroactive. This was because the wrongful exclusion of such persons "undermined 'the very integrity of the . . . process' " by which a defendant's fate

was determined. 391 U.S. at 523, n. 22. Similarly here, for the reasons set out above, the unlawful exclusion of blacks totally undermines the proper functioning of the jury system.

Second, we suggest that the retroactive giving to white defendants a right long enjoyed by blacks will not have a harmful effect on the administration of justice, *i.e.*, it would not result in a general jail release. It must be remembered that what is involved here is the possible application of the *Whitus* decision to whites. Therefore, an examination of the impact of *Whitus* on black prisoners is instructive. (1) According to data available from the Georgia Department of Corrections, in the year July 1967—July 1968 (the year following *Whitus*), a substantial majority of the inmates of the Georgia prison system were black (5139 out of 8629). Thus, the retroactive application of a decision favorable to petitioner in this case would affect a minority of those convicted in Georgia. (2) As the figures cited above show, *Whitus* had the potential of releasing nearly 60% of those incarcerated in Georgia when it was handed down. Nevertheless, subsequent figures indicate no such general jail delivery. Thus, in 1971 the number of blacks and the total number of prisoners was approximately the same (4991 out of 8205) as in 1967-68. There is no reason to expect any more deleterious effect from a decision in this case than there was from *Whitus*.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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